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Case No.

In The Supreme Court of The United States

October Term, 1987

In re Barbara J. Branson, Petitioner

ON EXTRAORDINARY WRIT OF MANDAMUS
OR IN THE ALTERNATIVE
ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Reply to County's Response

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November 9, 1987

EDITOR'S NOTE

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ON EXTRAORDINARY WRIT OF MANDAMUS

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REPLY TO COUNTY'S RESPONSE

INTRODUCTION

After having read the Petition herein, a reading of the response presented by the County of Los Angeles and the named County officials to said Petition for an extra-ordinary writ of mandamus, shows that the response is not responsive to the Petition; that it is designed merely to cloud the real issues, to deceive and confuse this Court, and to further frustrate petitioner's right

of access to the courts to vindicate her Constitutional rights and protections on the merits according to an examination of the evidence before a jury, in accordance with the spirit of the Federal Rules.

The tragedy of this entire case has been the failure of the district and appellate courts to consider any of petitioner's input, i.e., petitioner's citation of law and of facts to the record, and weigh that evidence against the material presented by the real parties in interest (hereinafter referred to as "the County") before making such drastic, dispositive decisions --in fact, the most severe and damaging dispositions that could possibly be made: the summary and total elimination of petitioner's entire case at a very early stage of the proceeding.

What makes that a tragedy is that this disposition is carried out by the courts by simply parroting counter-allegations made by the County which are based on unfounded

"facts" uncited and unsubstantiated by law or by the record itself, and which are actually in direct conflict with the law applicable to this case and with the facts shown by the record.

Nevertheless, all courts up to date have seen fit to flout the law, proper procedure, appropriate standards of review, ethics, and even the basic facts of this case for the sake of upholding the government at any cost. The courts (and, for purposes of this petition to the High Court, particular reference to the Ninth Circuit Court of Appeals is made) have allowed themselves to be moulded and manipulated by the County and to be "tutored" by the County in formulating its decisions, as a comparison of those decisions and the County's input in this case will disclose. The "touchstone of due process" established by this Court (see *Wolff v. McDonnell* (1974) 418 U.S. 539, 558) has become meaningless in this case. There has

not only been "arbitrary action of government" against which petitioner was to be protected by the courts (see *Wolff, supra*), but there has been arbitrary action of the courts against which petitioner has no protection, save and except by this High Court of last resort.

Once again, in this Supreme Court proceeding, the County fails to address the law cited by petitioner, especially *Logan v. Zimmerman Brush Co.* (1982) 455 U.S. 422 upon which petitioner's federal case is based; fails to address the portions of the record cited by petitioner showing evidence to substantiate her claims; and fails to address the issues presented. The history of this case reveals that these failures by the County have transmogrified into seeming "victories", albeit by judicial fiat, by the courts merely "following suit", failing themselves to perform their duty.

REPLY TO

THE COUNTY'S "QUESTIONS PRESENTED"

(1) From a study of Supreme Court procedure, the "Questions Presented" portion appears to be a responsibility of a moving party; i.e., a petitioner or an appellant seeking relief, and not that of a responding party. It would appear, from common sense at least, that a "response" means just that--a response to what was presented by petition or other initiating document.

Supreme Court Rule 22.1 directs that opposing briefs shall be in compliance with Rules 33 and 34. Regarding "Questions Presented", Rule 34.2 states that "items (a) ...need not be included unless the appellee or respondent is dissatisfied with their presentation by the other side. ..." (These Rules are quoted in full in the Appendix). However, "being dissatisfied with their presentation by the other side" does not seem to permit a total disregard thereof.

(2) The "Questions Presented" by the County are in total disregard of the "Questions Presented" by petitioner. Petitioner's questions relate to the duty of the Court of Appeal in exercising appellate review of petitioner's appeal; they have nothing to do with the petition for rehearing, or with any state court decision.

(3) The County's fifth "Question Presented", rather than being responsive to petitioner's questions, appears to be a counter-question to petitioner's Question No. 2. However, under the corresponding arguments, the County's Argument No. 5 is totally nonresponsive to petitioner's Argument No. 2 dealing with the issue of "due process". The destruction of petitioner's property interest under *Logan* remains unaddressed.

(4) The County's "Questions Presented" appear to be based only on the requirements for a writ of certiorari, totally over-

looking the fact that the petition in this case is one for an extraordinary writ of mandamus in the first instance. Nothing whatsoever has been presented by the County in response to a petition for an extraordinary writ.

REPLY TO THE COUNTY'S "STATEMENT OF THE CASE"

On page 1 of its response, the County fails to accurately state the reasons or theory for the filing of the federal complaint. The complaint did not merely "arise from petitioner's discharge from the County of Los Angeles and the subsequent proceedings before the Civil Service Commission... and in the courts of the State", but as stated in the Petition at page 5, the complaint was filed in federal court "after having been denied a postdeprivation hearing on the cause of discharge [emphasis in original] ... " and the ultimate destruction of

petitioner's property interest as set forth in *Logan v. Zimmerman Brush Co.*, referred to as a "Logan violation". (Pet'n. p.5 Fn.2) AT NO TIME has the County or any court addressed the *Logan* case --a crucial and deliberate omission throughout this case!

The next sentence at the top of page 2 of the response includes a mere allegation that petitioner "refused to return to work after respondent County...honored federal and California tax levies on her wages." Such a statement is not a fact and it conflicts with the allegations of the first amended complaint as well as with evidence in the record. The County's statements are merely charges by the County against petitioner which she denies and upon which she has never been afforded an opportunity to be heard. For example, AT NO TIME has the County or any court, and certainly no federal court, has ever addressed the concealment of the federal tax levy; no federal court has

addressed that evidence. Nevertheless, the issue of tax levies is irrelevant to the real issue of this case: proper review standards in examining the contents of the complaint for stating a federal claim. It does show, however, that there are factual disputes about the tax levies, which precludes a summary judgment disposition.

Although irrelevant to the issues before this Court, petitioner points out that the Magistrate who participated in this case actually violated the United States Magistrates Act as shown in petitioner's Motion to Vacate Order of Reference [Doc.18], which was the reason the motion was filed. The County fails to mention that fact when discussing the proceedings before the Magistrate on page 3 of the response. The Magistrate had failed to file a recommendation at the time petitioner filed her Motion to Vacate Reference on August 16, 1985; a recommendation was lodged with the court approximately a

week after the motion was filed.

Also, while mentioning the proceedings of September 16, 1985 (response, page 4) the County fails to mention that the insurance company (United Pacific) was dismissed without leave to amend as to that defendant. (See Pet'n. page B-3; also pages 5 and 8).

The jurisdictional statements on pp 5-6 of the response are reasonably correct. While the Court of Appeal had appellate jurisdiction in this case, the questions presented by petitioner relate to its proper exercise thereof according to law.

REPLY TO THE COUNTY'S "ARGUMENT"

It is interesting to note that the County closes its purported "Statement of the Case" (response, page 6) with "Timeliness of Appeal" and jumps from that directly to the denial of petitioner's request for rehearing, avoiding altogether even mentioning the decision of the Court of Appeals on

petitioner's appeal, which is the subject item for review before this High Court. Petitioner discusses that "unpublished memorandum opinion" in her Statement of the Case (Pet'n. pp 9-10), attaching a replica thereof as "Appendix A" as required by the Rules.

Petitioner then states at pages 11 and 12 of the Petition: "It is this memorandum decision of the Court of Appeal, by Circuit Judges Kilkenny, Sneed, and O'Scannlain for the Ninth Circuit [App.A] which is the subject for review by this Court and the defects of which memorandum are discussed in detail in the argument which follows."

It is this "subject for review" before this Court and the defects of which subject is the entire subject-matter of the Petition to which the County is supposedly responding that the County has totally failed to talk about in its response!

Argument No. 1 (Response, p.6) is frivolous. First, it addresses "The Court of

Appeals decision to deny the petition for rehearing by the petitioner" which is not the subject-matter before this Court. Second, while petitioner is seeking relief by certiorari in the alternative, grounds for certiorari would rest principally upon the third clause under Rule 17.1(a) which is not discussed by the County under Argument No. 1 (Response, pp 7-8). The third clause under Rule 17.1(a) states "...or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." (See Response, p.7 Fn.1). That ground plainly would apply based on the matters presented in the Petition. It is unclear which "federal court of appeals' decision denying petitioner relief" is being discussed on page 8 of the Response under the first argument. If for rehearing, it is irrelevant; if the memorandum decision

covered by Appendix A of the Petition, it most certainly does conflict with decisions of other federal court of appeals involving the same matter, as the bulk of the Petition demonstrates by citation to law and to the record. It also conflicts with applicable decisions of this Court, as the Petition also discusses. The most blatant conflict is that with the *Logan* case which is <u>never</u> discussed by the County or the lower courts. Hence, Rule 17.1(c), second clause, is another ground for certiorari, which states: "When a state court or a federal court of appeals...has decided a federal question in a way in conflict with applicable decisions of this Court."

Nevertheless, the Petition before this Court brings the memorandum decision of the Court of Appeals filed April 29, 1987, up for review; the County has failed to address that document and petitioner's arguments relating thereto.

Argument No. 2 (Response, p.8) is likewise frivolous and non-responsive to the Petition for reasons given in the reply to the first argument, above.

Argument No. 3 (Response, p.10) is also frivolous; a state court decision is not the subject-matter before this Court.

While Argument No. 4 (Response, p.11) discusses Rule 17.1(c), a ground for certiorari as discussed previously herein, it is non-responsive to the Petition in that it ignores the *Logan* case entirely which is the major conflict of the Court of Appeals decision in this case with a landmark decision of this Court. The County has also failed to address any of the 63 **cases** cited in the Petition with which the subject decision of the Court of Appeals is in conflict.

In reply to Argument No. 5 (Response, p.12), petitioner specifically denies that she was afforded several opportunities, or any opportunity, to be heard upon the charges

laid upon her by the County, and would so deny, under oath, before a jury.

Petitioner further specifically denies the following: that she hasn't paid her taxes; that the County complied with any garnishment order; that petitioner received a paycheck reduced by the appropriate amount; that petitioner "simply" stopped coming to work; that petitioner was properly served with a notice of discharge pursuant to prescribed rules; the charge of "unauthorized absenteeism"; that petitioner was absent to protest her wage garnishment; that Judge Epstein had jurisdiction under administrative mandamus to make a finding that petitioner had admitted she was absent to protest her wage garnishment; that Judge Epstein acted within the scope of administrative mandamus (CCP §1094.5); that the only hearing required was one limited to the appropriateness of the "degree of discipline"; that the issue of "degree of discipline" was

before the court; that Judge Epstein issued a peremptory writ related to the petition before him; that petitioner ever petitioned the United States Court of Appeals for a writ of prohibition; that the hearing held October 9, 1984, was legitimate according to law; that the United States Court of Appeals has any connection with "the May 8, 1985 order" (a state court decision); that petitioner was provided with any forum in which to adjudicate her claim.

Moreover, the reporter's transcript of May 8, 1985 refutes the County's arguments.[1]

1. [Judge Epstein speaking]: "If the matter is disputed-- whether the absence was authorized or not or even if unauthorized-- what the reason for it was, whether indeed she was taking that position that I refuse to go back to work until you stop garnisheeing my wages as -- and honoring what I consider to be an illegal request by the Franchise Tax Board, [*Note: the federal garnishment was not known on the record at this time*] whether that's the case or not or whether the absence was due to something else -- forgive my syntax. What I meant to say if there is a disputed question of fact about that then I would think she is entitled to a hearing on those merits. ¶At the last proceeding [May 18, 1984], I accepted the position that you [County Counsel] urged that there really was no dispute about that. ..." (Repor-

Furthermore, the County's arguments are further refuted by the June 10, 1985, proceeding before Judge Epstein when it was first discovered that a federal garnishment had taken place --information that had theretofore been concealed from petitioner and from the record. (See Petition, pp 56-57)

It is the state court's position that the state (County) has discretion to deny a hearing on the cause of discharge, and it is that position which the County currently takes, as a reading of Argument No. 5 dis-

ter's Trans. 5/8/85, Los Angeles Superior Court, Case No. C-492725, page 12 line 21 through page 13 line 4) *Another portion of the same transcript (seven months after the October 9, 1984 hearing was held, which the Court of Appeals stated satisfied due process) proving that a hearing on the cause of discharge wasn't held:* [Judge Epstein speaking]: "...If you assume for the sake of argument only --not a real concession-- that there is a dispute as to whether that's the reason that she didn't return to work or whether something else is the reason, would you agree a hearing should have been held?
MR. HUDGENS *(Deputy County Counsel)*: I believe so.
THE COURT: On the ground of discipline?
MR. HUDGENS: I believe so, yes. ..." (Page 14 lines 10-17).

closes. It is also that position which is currently headed for this Court on appeal, as soon as the state courts deny rehearing and review, based on constitutional challenges of several statutes and civil service rules. That appeal should come up in approximately eight months from now or sooner.

There has been no state action filed yet; all state proceedings (for more than four years) have been merely administrative review dealing strictly with procedure. There has been no evidentiary adjudication on the merits of the discharge. The limitations period for a tort claim does not begin to run until after all appeals (including the appeal to this Court which is coming up) have been completed. However, petitioner is seeking a remedy in federal court where it now belongs, despite any tort action that may be available sometime in the future before the same state courts that have refused administrative relief.

Argument No. 5 proves petitioner's position that, pursuant to the spirit of the Federal Rules, these disputed issues, of which there are many, must be tested on their merits by evidence before a jury. The County's arguments form the basis for their affirmative defenses which should be pled by way of answer; they should not serve to foreclose petitioner from the basic right of access to a federal remedy. Regardless of the numerous appearances in state court, inaccurately and incompletely outlined by the County, petitioner has never been granted an evidentiary hearing on the cause of her discharge -- a violation of federal law. Petitioner includes, in Appendix B hereto, declarations attesting to that fact.

CONCLUSION

The County's conclusion is totally refuted and opposed by the evidence shown by the record and in the Petition. The

County's position is shown by evidence to be merely a defense to petitioner's complaint. The few pleading technicalities that may still exist can certainly be corrected by amendment, as the Rules liberally permit; summary judgment is not supported by the evidence.

Petitioner respectfully requests that this, the Highest Court of the Land, be the first court to exercise good faith in reviewing this case based on both sides of the controversy, and not just the County's side. Let the "touchstone of due process" established by this Court be meaningful in this case; let the *Logan* case be meaningful, as well as all cases cited by petitioner. May the four years this case has languished in the courts not conclude as a total sham and mockery of American jurisprudence. May this Court acknowledge the truth and administer justice for the first time in this case!

* * * Barbara Brandon 11/9/87

AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

BARBARA J. BRANSON, being first duly sworn, deposes and says:

That on November 9, 1987, she served three copies of the within REPLY TO COUNTY'S RESPONSE on all parties by placing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

UNITED STATES COURT OF APPEALS
For the Ninth Circuit
P.O. Box 547, 7th & Mission Sts.
San Francisco CA 94101

HON. JOHN F. KILKENNY
Circuit Judge, Ninth Circuit
P.O. Box 547, 7th & Mission Sts.
San Francisco CA 94101

HON. JOSEPH T. SNEED
Circuit Judge, Ninth Circuit
P.O. Box 547, 7th & Mission Sts.
San Francisco CA 94101

HON. DIARMUID F. O'SCANNLAIN
Circuit Judge, Ninth Circuit
P.O. Box 547, 7th & Mission Sts.
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3435 Wilshire Blvd., 30th Floor
Los Angeles CA 90010

Dated: November 9, 1987

Barbara J. Branson
BARBARA J. BRANSON

Subscribed and sworn to
before me this 9 day
of November, 1987.

Notary Public in and for
said County and State

My Commission expires 12-16-87

OFFICIAL SEAL
DEAN J. SELIMOS
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My Comm Expires Dec. 16, 1987

AFFIDAVIT OF SERVICE (p.2)

APPENDIX

SUPREME COURT RULE 22.1

Respondent shall have 30 days (unless enlarged by the Court or a Justice thereof or by the Clerk pursuant to Rule 29.4) after receipt of the petition, within which to file 40 printed copies of an opposing brief disclosing any matter or ground why the cause should not be reviewed by this Court. See Rule 17. Such brief in opposition shall comply with Rule 33 and with the requirements of Rule 34 governing a respondent's brief, and shall be served as prescribed by Rule 28. The Clerk shall not accept a brief which does not comply with this Rule and with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 46.

SUPREME COURT RULE 34.1

A brief of an appellant or petitioner on the merits shall comply in all respects with Rule 33, and shall contain in the order

here indicated:

(a) The questions presented for review, stated as required by Rule 15.1(a) or Rule 21.1(a), as the case may be. The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, except where the caption of the case in this Court contains the names of all such parties. This listing may be done in a footnote. See Rule 28.1.

(c) The table of contents and table of authorities, as required by Rule 33.5.

(d) Citations to the opinions and judgments delivered in the courts below.

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked, with citation to the statutory provision and to the time factors upon which such jurisdiction rests.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations which the case involves, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text, if not already set forth in the jurisdictional statement or petition for certiorari, shall be set forth in an appendix to the brief.

(g) A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate references to the Joint Appendix,

e.g.(J.A.12) or to the record, *e.g.*(R.12).

(h) A summary of argument, suitably paragraphed, which should be a succinct, but accurate and clear, condensation of the argument actually made in the body of the brief. It should not be a mere repetition of the headings under which the argument is arranged.

(i) The argument, exhibiting clearly the points of fact and of law being presented, citing the authorities and statutes relied upon.

(j) A conclusion, specifying with particularity the relief to which the party believes himself entitled.

SUPREME COURT RULE 34.2

The brief filed by an appellee or respondent shall conform to the foregoing requirements, except that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or

omission in the statement by the other side, and except that items (a), (b), (d), (e), and (f) need not be included unless the appellee or respondent is dissatisfied with their presentation by the other side. See Rule 28.1.

* * *

DECLARATION OF MARK KING

State of California, County of Los Angeles:

I, Mark King, declare as follows:

I have been present at each of the various administrative proceedings regarding Barbara Branson, including the October 9, 1984 proceeding before the Civil Service Commission.

In spite of repeated attempts to obtain a full hearing on the charges against Mrs. Branson, she was continuously thwarted by the Civil Service Commission, the Superior Court, the California Court of Appeals, and the California Supreme Court.

Barbara Branson objected to the proceedings of October 9, 1984 as not meeting statutory requirements and she was precluded from presenting any defense against the charges laid by the County of Los Angeles, her employer.

At this October 9th proceeding, every attempt to raise a question relating to facts prior to the date of her initial absence

was met with an objection as being "beyond the scope of the hearing" and was sustained in each instance.

Subsequently, I heard Superior Court Judge Norman Epstein admit (on May 8, 1985) the possibility that the October 9, 1984 proceeding, which he previously ordered over the objection of both parties, was improper and inadequate because of unresolved issues between Barbara Branson and the County of Los Angeles.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and would so testify under oath before a court or a jury.

Executed this 1st day of November, 1987, at Los Angeles, California.

Mark King

MARK KING

DECLARATION OF RONALD BRANSON

State of California, County of Los Angeles:

I, Ronald Branson, declare as follows:

That I have administratively represented or attended each and every court proceeding in Barbara Branson's case, both in the State administrative proceedings and in this instant Federal action.

At no time has Barbara Branson ever been afforded a forum in which to dispute or have heard the disputed facts relating to the cause of her discharge from employment of the County of Los Angeles.

I further testify that I personally heard the County, through deputy County Counsel Joe Ben Hudgens, admit before Judge Norman Epstein on May 8, 1985, that Barbara Branson should have an opportunity to be heard on the charges if she disputes those charges; and I also personally heard Judge Epstein put into question the legality of the County's discharge of Mrs. Branson

without having had a hearing on the charges at the June 10, 1985 supplementary proceeding. Judge Epstein immediately thereafter removed himself from her case and no hearing to date has transpired.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and would so testify under oath before a court or a jury without hesitation.

Executed this 6 day of November, 1987 at Los Angeles, California.

Ronald Branson

RONALD BRANSON

* * *